No. 14-114

IN THE

Supreme Court of the United States

DAVID KING; DOUGLAS HURST;
BRENDA LEVY; and ROSE LUCK,

Petitioners,

v.

SYLVIA MATHEWS BURWELL, as U.S. Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; JACOB LEW, as U.S. Secretary of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY; INTERNAL REVENUE SERVICE; and JOHN KOSKINEN, as Commissioner of Internal Revenue,

Respondents.

On Writ of Certiorari to the U.S. Court Of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* CATO INSTITUTE AND PROF. JOSH BLACKMAN IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Section 36B of the Internal Revenue Code, which was enacted as part of the Patient Protection and Affordable Care Act, authorizes federal tax-credit subsidies for health insurance coverage that is purchased through an "Exchange established *by the State*" (emphasis added). The question presented is whether the Internal Revenue Service may promulgate regulations to also extend the tax-credit subsidies to insurance coverage purchased through Exchanges established by the federal government.

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing individual liberty and free markets. Cato's Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, files briefs in the courts, and produces the *Cato Supreme Court Review*. Cato has been indefatigable in its opposition to laws and executive actions that go beyond constitutional authority, regardless of the underlying policy merits.

Josh Blackman is a constitutional law professor at the South Texas College of Law, Houston. Prof. Blackman is an expert on the Affordable Care Act, having written several law review articles about the law, along with the critically acclaimed book, *Unprecedented: The Constitutional Challenge to Obamacare* (2013).

Amici submit this brief to alert the Court to the administrative and separation-of-powers violations attending the ACA's implementation. The rule of law will be weakened if the government's interpretation of the statutory provisions at issue here prevails.

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[1] Rule 37 statements: All parties were timely notified and have consented to the filing of this brief. Counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

This case is about much more than statutory interpretation and *Chevron* deference. It is about the separation of powers and the rule of law. The Patient Protection and Affordable Care Act (ACA) is the most wide-ranging law of our young century. Through the ACA, Congress sought to transform the way Americans access health insurance. In many places, Congress gave the executive branch broad latitude to decide how best to implement the law. For the law's most important parts, however—the "three-legged stool" of coverage rules, mandates, and subsidies—Congress spoke precisely, providing specific dates, formulas, and directions for implementation.

First, an individual mandate was imposed to penalize certain people who do not maintain "minimum essential coverage" after January 1, 2014. Second, an employer mandate was designed to penalize certain employers who do not offer such comprehensive insurance to their employees after that date. Both mandates were structured to offset the cost of the "minimum essential coverage" for virtually all Americans. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2585 (2012) ("*NFIB*") ("This allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept."). Finally, and most relevant here, an elaborate schedule of subsidies was appropriated for states choosing to create exchanges—Congress could not command states to establish them—to assist those who lack employer-sponsored insurance. Again, the subsidies were designed to offset the cost of providing "minimum essential coverage" for millions.

In what has become a troubling pattern of abuse, the executive branch has modified, delayed, and suspended these three pillars of the ACA. None of these provisions have gone into effect as Congress designed because they conflicted with the president's policy preferences. Through a series of memoranda, regulations, *and even blog posts*, executive officials have disregarded statutory text, ignored legislative history, and remade the law on their own terms.

Executive lawmaking—which has alas become commonplace—poses a severe threat to the separation-of-powers principles that undergird the Constitution and ultimately the rule of law itself. Accordingly, this Court should vacate the IRS rule that provides subsidies in states that did not establish exchanges. This rule violates Congress's limitation of such subsidies to insurance bought through exchanges "established by the State."

ARGUMENT

I. THE INDIVIDUAL MANDATE AND ITS ACCOMPANYING PENALTY WERE UNCONSTITUTIONALLY MODIFIED, DELAYED, AND SUSPENDED

The president has not allowed the individual mandate and its accompanying penalty to go into effect as Congress designed.[2] Through a series of

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[2] This Court, through the application of a constitutional "saving construction," treated the law's mandate and penalty as a single provision, deemed a "tax." *NFIB*, 132 S.Ct. at 2593-94 ("The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read."). For statutory-interpretation purposes, however, the Court construed the law as a mandate

memoranda, letters, and regulations, the executive branch delayed the "minimum essential coverage" provision for two years, suspended the requirement that millions maintain qualifying insurance, and exempted people from the mandate and penalty. These actions frustrate the intricate framework designed by Congress to expand access to comprehensive health insurance starting in 2014.

A. Health Insurance That Does Not Provide "Minimum Essential Coverage" Is Non-Compliant Under The ACA

The Affordable Care Act's individual mandate, designed by "the Nation's elected leaders," was carefully crafted to avoid an "adverse-selection death spiral in the health insurance market." *NFIB*, 132 S.Ct. at 2577; *id.* at 2626 (Ginsburg, J., concurring in part). Congress determined that the "requirement to maintain minimum essential coverage" would go into effect on January 1, 2014, to ensure that *all* plans provided "minimum essential coverage." 26 U.S.C. § 5000A(a). Consumers who failed to purchase qualifying plans would be subject to the ACA's penalty. 42 U.S.C. §§ 300gg–300gg-6, 300gg-8, 18011, 18011(1). A necessary consequence of Congress's decision to oblige "minimum essential coverage" was that non-compliant plans would have to be cancelled.

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enforced by a penalty. *Id.* at 2584 ("The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti–Injunction Act."). As this case is one of statutory interpretation, *amici* will refer to the ACA's "requirement to maintain essential coverage" as a mandate and its enforcement mechanism as a "penalty" (as Congress did, 26 U.S.C. § 5000A(b)(1)).

Months after the law was enacted, the Department of Health and Human Services (HHS) forecasted that "the percentage of individual market policies losing grandfather status in a given year [would exceed] the 40 percent to 67 percent range." 75 Fed. Reg. 34,538, 34,553 (June 17, 2010). Media reports revealed that the White House knew that "50 to 75 percent of the 14 million consumers who buy their insurance individually" would receive cancellation notices. *Obama Admin. Knew Millions Could Not Keep Their Health Insurance*, NBC News (Oct. 28, 2013), http://goo.gl/daZAJY. Indeed, regulations were issued to make it even harder for some plans to maintain grandfather status. *See* 45 C.F.R. § 147.140(g) (2010).

As the solicitor general explained to this Court last term, the number of policies that will remain grandfathered is "very, very low." Tr. of Oral Arg. at 59-60, *Sebelius v. Hobby Lobby*, No. 13-354 (Mar. 25, 2014), 134 S. Ct. 2751. In the fall of 2013, as forecast, millions of Americans received cancellation notices. *Policy Notifications and Current Status, By State*, Yahoo! News (Dec. 26, 2013), http://goo.gl/MSDRp4. This development devastated the law's popularity. *Americans' Approval of Healthcare Law Declines*, Gallup (Nov. 14, 2013), http://goo.gl/ojs74e.

B. The "Administrative Fix" Waived The Individual Mandate/Penalty For Millions

The cancellation crisis came to a head on November 14, 2013, when President Obama announced what came to be known as the "administrative fix." Statement by the President on the Affordable Care Act (Nov. 14, 2013), http://goo.gl/6c3utS ("Press Conf. Statement"). At a

press conference, the president recognized the difficulties posed by the cancelled policies: "I completely get how upsetting this can be for a lot of Americans, particularly after assurances they heard from me that if they had a plan that they liked, they could keep it."[3] *Id.* In response, the president "offer[ed] an idea that will help." However, it was far more than a mere "idea." The presidential proclamation would "extend" the ACA's "grandfather clause" to "people whose plans have changed since the law took effect." *Id.* The decree permitted "insurers [to] extend current plans that would otherwise be canceled into 2014, and [allowed] Americans whose plans have been cancelled [to] choose to re-enroll in the same kind of plan." *Id.*

Shortly after that press conference, the administration memorialized the new policy in a letter, stating that non-compliant health plans "will not be considered to be out of compliance" in certain circumstances. Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, HHS, to State Ins. Comm'rs (Nov. 14, 2013) ("Cohen Letter"). In other words, the very plans that the law rendered invalid because they did not provide "minimum essential coverage" would now be deemed valid. Under the ACA, those who are not "covered under minimum essential coverage" "*shall* for each month beginning after 2013" pay a "penalty." 26 USC § 5000A(a)-(b) (emphasis added). But the "administrative fix" waived the "minimum essential coverage" rule for

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[3] Politifact selected this assurance as 2013's "Lie of the Year." Angie D. Holan, *Lie of the Year: 'If You Like Your Health Care Plan, You Can Keep It,'* PolitiFact (Dec. 12, 2013), http://goo.gl/wVIOP4.

millions; people who renewed non-grandfathered plans were exempted from the mandate and penalty.

President Obama explained that "what we want to do is to be able to say to folks" whose policies were cancelled is that "the Affordable Care Act is not going to be the reason why insurers have to cancel your plan." Press Conf. Statement. That motivation for executive action may or may not be admirable, but it distorts reality. Congress "says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). It is *precisely* the ACA's requirements that caused plans to be cancelled; the administrative fix did nothing—could do nothing—to change the law that Congress passed. It only suspended the consequences of Congress's decision to guarantee "minimum essential coverage" for all.

C. HHS Offered Exemptions to the Mandate/ Penalty Inconsistent with Statutory Text

As broad as the administrative fix was, it did not help those who were unable to buy a new policy after their old policy was cancelled. Consequently, six senators wrote to the HHS Secretary, seeking "explicit clarity" on whether those who had cancelled plans, but could not buy new policies, would be exempted from the mandate and penalty. Letter from Senator Warner et al. to Secretary Sebelius (Dec. 19, 2013), http://goo.gl/JZdbNE. The next day, the secretary acknowledged that "too many [consumers] have found [that] their policies bec[a]me unaffordable." Letter from Secretary Sebelius to Senator Warner (Dec. 20, 2013), http://goo.gl/W8V5nH. This is especially true in the states that disregarded the "administrative fix" and

did not permit insurers to offer non-compliant (and cheaper) plans. *Id.* Secretary Sebelius offered another "clarification" that "those with canceled plans who might be having difficulty paying for a" compliant plan should "qualify for this temporary hardship exemption," thereby exempting then "from the individual responsibility requirement." *Id.*

In a memorandum issued the same day, HHS explained that anyone whose policy "will not be renewed," or whose new plan is "more expensive than" the cancelled plan, "will be eligible for a hardship exemption." CMS Memorandum, "Options Available for Consumers with Cancelled Policies," (Dec. 19, 2013), http://goo.gl/9GC4Vl. These consumers were, in effect, excused from the individual mandate/penalty. But these weren't the types of exemptions Congress wrote into the ACA.

Congress created several categories of people who would be exempted from the ACA's mandate/penalty: "individuals who cannot afford coverage," "taxpayers with incomes below filing threshold," "member[s] of Indian tribes," and anyone who "suffered a hardship with respect to the capability to obtain coverage under a qualified plan." 26 USC § 5000A(e)(1)-(5).[4] Congress set a strict threshold for exemptions from the penalty due to inability to pay: those for whom the annual cost of coverage exceeds eight percent of

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[4] The solicitor general cited these exemptions at oral argument to demonstrate that Congress did not intend to impose a "requirement" to purchase health insurance "which is entirely stand-alone" from the payment of the penalty. Tr. of Oral Arg. at 45-46, *HHS v. Florida*, No. 11-398 (Mar. 27, 2012), *decided sub nom NFIB v. Sebelius*, 132 S. Ct. 2566. This Court rejected that argument. *NFIB*, 132 S. Ct. at 2584.

household income. 26 U.S.C. § 5000A(e)(1)(A). The secretary's blanket policy of exempting *anyone* whose insurance was more expensive then before, irrespective of annual income, is impossible to reconcile with the congressional scheme. This hardship "exemption" swallows the rule. "For these people, in other words, Obamacare itself is the hardship." Ezra Klein, *The Individual Mandate No Longer Applies to People Whose Plans Were Canceled*, Wash. Post (Dec. 19, 2013), http://goo.gl/ZEeRJU. Through this administrative-law shell game, the executive swept away Congress's exemption design.

Once again faced with a statute that yielded politically unpopular results, the administration suspended the enforcement of the mandate/penalty for millions, waived "minimum essential coverage" requirements in 2014, and expanded the scope of hardship exemptions in a manner entirely inconsistent with Congress's design. This decision created not just a legal conundrum, but a breach of the separation of powers. "It is quite impossible, however, when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 603 (1952) (Frankfurter, J.). The government's decision to modify the mandate, where "authority [is] so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress." *Id.* Unilaterally refusing to enforce the ACA's "minimum essential coverage" requirement and accompanying penalty—the very

provisions the government told the Court in *NFIB* could not be severed[5]—tramples the rule of law.

Suspension of laws through broad transitional relief, blanket enforcement waivers under the guise of prosecutorial discretion, and regulations without statutory basis are all species of executive lawmaking that violate the separation of powers. As the Framers' progenitors recognized over three centuries ago, "the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal." English Bill of Rights (1689). This fear of the executive unilaterally suspending the law inspired key provisions of our foundational documents. Decl. of Indep. ("For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever"); U.S. Const. art II, § 3 ("[The president] shall take Care that the Laws be faithfully executed"). In our system, "[t]here is no provision in the Constitution that authorizes the president to enact, to amend, or to repeal statutes." *Clinton v. City of New York*, 524 U.S. 417, 438 (1998).

If a law is unworkable or unpopular, the sole remedy is for Congress to change it. Alas, just as President Obama simply decreed the "administrative fix," he threatened to veto the Keep Your Health Plan Act of 2013, H.R. 3350, 113th Cong. (2013). This two-paragraph bill would have grandfathered all

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[5] As the government explained to this Court, it was "evident that Congress would not have intended the guaranteed-issue and community-rating provisions to take effect in 2014 if the minimum coverage provision were held unconstitutional, and those provisions accordingly are inseverable from it." Br. for Resps. on Severability at 44, *NFIB*, 132 S.Ct. 2566.

plans in existence through 2014. Justin Sink, *White House Threatens Veto of Upton Bill*, The Hill (Nov. 14, 2013), http://goo.gl/wbxTmb. In effect, Congress sought to achieve the relief of the "administrative fix" through the proper constitutional channel: a law, not an executive action.[6] Yet the president threatened to veto it, claiming it would "sabotage" the ACA. Statement of Administration Policy (Nov. 14, 2013), http://goo.gl/NA0dz7. But this pithy bill that passed the House on a bipartisan basis did no such thing. It merely attempted to codify through legislation that which the president claimed authority to do by fiat.

When viewed in sequence, the administration's actions show clear disregard for the ACA: it (1) advised insurers that they could sell non-compliant plans, (2) exempted consumers who bought these non-compliant plans from the mandate/penalty, (3) "encouraged" states to allow insurers to offer non-compliant plans,[7] and (4) barred HHS from serving as a congressionally mandated backstop in the event that steps 1-3 happen.[8] All this happened while the president threatened to veto a bill that would have lawfully accomplished all the above. These executive actions thwarted the very goals Congress articulated.

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[6] *Obama Issues "Executive Orders By Another Name,"* USA Today (Dec. 17, 2014), http://goo.gl/gBS7QC.

[7] Cohen Letter ("State agencies responsible for enforcing the specified market reforms are encouraged to adopt the same transitional policy with respect to this coverage.").

[8] The "administrative fix" is now subject to a legal challenge. *West Virginia v. HHS*, 1:14-cv-01287 (D.D.C. 2014).

II. THE EMPLOYER MANDATE WAS UNCONSTITUTIONALLY MODIFIED, DELAYED, AND SUSPENDED

Another ACA pillar is the employer mandate. This was the provision Congress used to force employers to provide insurance for their employees. When the employer mandate proved unpopular and led to the loss of jobs and work-hours, however, the executive branch delayed it until 2015, then modified it not to phase in completely until 2016. As with the individual mandate, the president has not allowed the employer mandate to take effect as Congress designed because it conflicts with his policy preferences. Accordingly, come January 2016—two years after Congress specified and nearly five after the ACA became law—neither the individual nor employer mandate will be fully in effect. This executive lawmaking—modifying and suspending a statutory date certain—is illegal.

A. Congress Designed The Employer Mandate To Punish Non-Compliant Employers In 2014

The ACA imposes penalties on certain employers with "more than 50 full-time employees" "that fail to offer to its full-time employees . . the opportunity to enroll in . . . an eligible employer-sponsored plan." 26 U.S.C. § 4980H(a)-(c). Section 1513(d) instructs employers that this requirement "*shall* apply to months beginning after December 31, 2013," nearly three years after the ACA became law. This date certain reflects Congress's deliberate choice to ensure that the employer mandate would go into effect on the same day as many other aspects of the law. The legislative design here is apparent: despite the

negative impact on businesses, the ACA should be implemented on schedule for the benefit of all Americans. Yet, much like its individually applicable counterpart, the employer mandate will not go into effect until 2016 (barring further delays).

After the ACA's enactment, the employer mandate grew increasingly unpopular. Robb Mandelbaum, *The Employer Mandate Has Been Delayed. Will It Be Rewritten?*, N.Y. Times Blog (July 3, 2013), http://goo.gl/qEOZF7. Affected employers lobbied the executive branch to delay the mandate. As President Obama explained, "businesses came to us and said, listen, we were supportive of providing health insurance to employees, in fact, we provide health insurance to our employees; we understand you want to get at the bad actors here, but are there ways to provide us some administrative relief?" *Interview with President Obama*, N.Y. Times (July 27 2013), http://goo.gl/K4qZJ7. The president responded that "it made sense to give another year not only for companies to prepare, but also for us to work with Treasury and others to see if there are just ways we can make this a little bit simpler for companies who are already doing the right thing." *Id.* This rent-seeking—without input from non-corporate voices—resulted in the first delay of the employer mandate.

B. The Mandate's Delay Via Blog Post

On July 2, 2013, Mark Manzur, the assistant secretary for tax policy, published a post on the Treasury Department's blog. Ironically titled "Continuing to Implement the ACA in a Careful, Thoughtful Manner," the blog post decreed a suspension of the employer mandate. Treasury Notes (July 2, 2013), http://goo.gl/WQKJ7C ("Blog Post").

Disregarding the statute that expressly provided that the mandate "*shall* apply to months beginning after December 31, 2013," the administration announced that it "will provide an additional year before the ACA mandatory employer and insurer reporting requirements begin." *Id.* To justify this "transitional" policy, the post cited the "complexity of the requirements and the need for more time to implement them effectively." *Id.* But this complexity was a creature of the law Congress passed.

Although the blog post was framed in terms of delaying the ACA's onerous reporting demands—regarding which the HHS secretary does have significant discretion—the true impact of this delay was to prevent the government from being able to impose penalties on non-compliant employers. The post mentions, almost as a side note, that "[w]e recognize that this transition relief will make it impractical to determine which employers owe shared responsibility payments . . . . Accordingly, we are extending this transition relief to [them]." *Id.* With the click of a mouse—without so much as a tweet of notice to affected parties—the employer mandate was suspended for *all* employers.

The IRS Notice memorializing this action cited no more authority than Mazur's blog post.[9] With that maneuver, employers of all sizes were no longer subject to the employer mandate until 2015.

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[9] Shortly after the post went up, the IRS released a notice regarding "transition relief" that provided that "no employer shared responsibility payments will be assessed for 2014." IRS Notice 2013-45, 2013-31 I.R.B. 116, at 3 (July 9, 2013), http://goo.gl/71ZfJI. This delay is also subject to legal challenge. *U.S. House of Reps. v. Burwell*, 1:14-cv-01967 (D.D.C. 2014).

C. The Employer Mandate Was Later Modified and Suspended Until 2016

One year of "transition relief" was apparently not enough. Seven months after the infamous blog post, the Treasury Department postponed the full implementation of the employer mandate until 2016. Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544, 8574 (Feb. 12; 2014). But in doing so, the executive branch did not merely delay the mandate. Instead, it rewrote the ACA in a fragmented manner, with novel standards that deviated from Congress's rules.

First, for employers with 50 to 100 full-time employees, "no assessable payment . . . will apply for any calendar month during 2015." *Id.* For these small businesses, the employer mandate would be entirely delayed for two full years. Second, the mandate would only be partially implemented for employers with more than 100 employees. In 2015, such employers "will not be subject to an assessable payment" if they "offer[] coverage to at least 70 percent" of their employees. *Id.* at 8575. Starting in 2016, an employer that "offers such coverage to all but five percent" of employees—that is, offering coverage to 95 percent—will not "owe an assessable payment." *Id.* at 8597.

Absolutely none of this—not the bifurcation of employers, not the 70 percent transitional mandate, not the 95 percent final threshold—is in the ACA. In other words, without any statutory authority, the executive completely suspended the employer mandate for 2014, partially waived it for 2015, and decided that in 2016 and beyond the mandate will never be fully implemented as Congress designed.

"If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Bd. of Govs. of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (quoting *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984)). The ACA requires that *all* qualifying employers must offer coverage starting on January 1, 2014. No exceptions.

D. The President's "Temporary Modification" Was Unconstitutional

In July 2014, President Obama may have said more than he intended, referring to his rejiggering of the employer mandate as "making a temporary *modification* to the health care law" that Congress said "needed to be *modified*." Remarks by the President at the Signing of Fair Pay and Safe Workplace Executive Order (July 31, 2014), http://goo.gl/Yk5XQk (emphasis added). He added that "we *modify* it to make it easier for business to transition." *Id.* This statement illustrates three rationales for why the delays are unconstitutional and inconsistent with the rule of law.

First, the president cannot make a "temporary modification" to the law. Only Congress can do that. What the executive actually did is to decline to enforce the collection of the law's penalty under the auspices of prosecutorial discretion. In a press release, Mazur explained that the "final regulations phase in the standards." Treasury and IRS Issue Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act for 2015 (Feb. 10, 2014), http://goo.gl/NUja0z. But that is incorrect. In the classic legal debate between "rules"

and "standards," a date certain is a *rule* for which the mandate "*shall* apply." It is not a guideline open to interpretation or subject to wiggle-room. The law was operating as designed, but the president admitted that he preferred to placate unhappy employers.

Second, even if Congress said the law "needed to be modified," it is for Congress to do so.[10] When Congress set the law to go into effect on January 1, 2014, the president cannot disregard that date and partially implement the law over the course of two years. What the president did was to effect "a major shift of constitutional power away from Congress, which makes the laws, and toward the President, who is supposed to enforce them." Nicholas Bagley, *The Legality of Delaying Key Elements of the ACA*, New Eng. J. Med. (May 22, 2014), http://goo.gl/A9zgSI.

Third and perhaps more importantly, it frustrates the design of the ACA to "modify it to make it easier for business to transition." The fact that a law proves unpopular or difficult to comply with, does not authorize the president to disregard it. As the ACA was being debated, the employer mandate proved controversial. Robert Pear, *Obama Open to a Mandate on Health Insurance*, N.Y. Times (June 3, 2009), http://goo.gl/BOImW4. During the fall of 2009, Congress considered several approaches to ensure that employers would provide coverage. Katharine Q. Seelye, *Employer Mandate Becomes Sticky Issue in*

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[10] The employer mandate proved so unpopular that bills were introduced in both houses to amend the ACA to define a full-time work as 40 hours per week, not 30. Forty Hours is Full Time Act of 2013, S. 1188, 113th Cong.; Save American Workers Act of 2014, H.R. 2575, 113th Cong. (passed Apr. 3, 2014).

Reconciling Bills, N.Y. Times (Nov. 1, 2009), http://goo.gl/c22e9Z. Ultimately, the House and Senate struck a careful compromise, balancing concerns that the penalty would impose too large a burden on small businesses with concerns that the penalty would not be large enough to encourage employers to provide coverage. Huma Kahn, *Health Care Reform Would Entail Major Changes for Americans*, ABC News (Oct. 22, 2009), http://goo.gl/VbZSOQ. The executive's revisions make a hash of this legislative compromise.

Suspending statutory provisions while purporting to remain faithful to statutory text is a "headscratching oddity." *Judulang v. Holder*, 132 S. Ct. 476, 486 (2011). After Congress painstakingly arranged a very complicated ACA, the executive treated the law as a misbegotten jigsaw puzzle, arbitrarily rearranging the pieces and capriciously jamming them where they did not fit.

The modification of the mandate did "not direct that a *congressional policy* be executed in a manner prescribed by Congress—it direct[ed] that a *presidential policy* be executed in a manner prescribed by the President." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (emphasis added). As this Court explained last term, "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Util. Air Reg. Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). When Congress "directly spok[e] to the precise question at issue," *Chevron v. NRDC*, 467 U.S. 837, 842 (1984), there is no reason to presume Congress intended to delegate such broad authority

over a cornerstone of the law. There is no hint of a delegation of power to topple a pillar of the ACA. There is no mouse hole, let alone an elephant hiding in one. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). The decision to rewrite the employer mandate was contrary to the rule of law.

III. THE IRS RULE SIMILARLY NULLIFIES CONGRESS'S DESIGN

The simplest reading of 26 U.S.C. § 36B is that only states that establish exchanges can receive subsidies. The text was so clear that there was no need to engage in any rulemaking. Because the plain import of the language was not consistent with the executive's policy preferences, however, a series of elaborate rulemakings were undertaken that had the effect of nullifying Congress's considered judgment.

A. Section 36B, Like The ACA's Medicaid Expansion, Was Designed To Punish Uncooperative States

As with the individual and employer mandates, the administration was faced with another key provision that yielded politically unpopular results. Section 36B was a third pillar propping up the ACA. It authorized subsidies, in the form of refundable tax credits, for health insurance bought through a state-established exchange. The "credit" "shall be allowed" based on the number of months the "the taxpayer . . . is covered by a qualified health plan . . . enrolled in through an Exchange *established by the State*." 26 U.S.C. § 36B(c)(2)(A)(i) (emphasis added).

Through the payment of tax credits to people in states that establish exchanges, Congress crafted a careful mechanism with many interlocking gears. The subsidies were part of the "three-legged stool"

which would expand access to healthcare while respecting the competing interests of states, employers, and individuals.[11] Congress recognized that this compromise was not perfect—it could potentially deny benefits to citizens in recalcitrant states—but it was willing to take that risk.

Another example of this approach was Congress's controversial—and unconstitutional—decision to eliminate *all* Medicaid grants for states that did not expand coverage. *NFIB*, 132 S. Ct. at 2601 ("Congress is coercing the States to adopt the changes it wants by threatening to withhold all of a State's Medicaid grants.") The carrot was increasing grants and the stick was withdrawing a state's *entire* Medicaid budget. States respond to incentives, and recognized the potential crisis when HHS threatened to withhold billions in funding. Josh Blackman, *Unprecedented: The Constitutional Challenge to Obamacare* 203-209 (2014). Unwilling states could have denied health insurance to millions by refusing to expand Medicaid programs. Yet Congress made the calculated decision to offer states that "choice."

With Section 36B, as with the Medicaid expansion, Congress nudged all states to establish exchanges by threatening to withhold subsidies. As

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[11] Until recently, the government often cited the three-legged stool. *See, e.g.*, Br. of Appellees, *King v. Burwell*, 2014 WL 1028988 at *34 (4th Cir. Mar. 18 2014) (citing Jonathan Gruber, *Health Care Reform Is a "Three-Legged Stool,"* Ctr. for Am. Prog. (Aug. 5, 2010), http://goo.gl/9i1YLG). *But cf.* Jonathan Gruber at Noblis, at 32:00 (Jan. 18, 2012), www.youtube.com/watch?v=GtnEmPXEpr0 ("if you're a state and you don't set up an exchange, that means your citizens don't get their tax credits . I hope that's a blatant enough political reality that states will get their act together.").

the district court recognized, "Congress did not expect the states to turn down federal funds and fail to create and run their own Exchanges." *King v. Sebelius*, 997 F.Supp.2d 415, 431-432 (E.D.Va. 2014). Based on this expectation, Congress didn't even appropriate "money for the development of a federal exchange." *See* Amy Goldstein & Juliet Eilperin, *Challenges Have Dogged Obama's Health Plan Since 2010*, Wash. Post (Nov. 2, 2013), http://goo.gl/PcKTDC. Section 36B was perhaps the optimal way to achieve the twin aims of expanding insurance coverage and encouraging states to establish exchanges—and the precise way Congress chose.

B. The IRS Rule Should Never Have Been Issued

The ACA was operating according to plan, but not without growing pains. Three dozen states declined to establish exchanges. So, much like the individual mandate, which resulted in policies being cancelled, and the employer mandate, which hurt employers, Section 36B forced those 36 states to swallow a bitter pill: their residents would be denied subsidies.

These results were again unacceptable to an administration intent on pain-free implementation. So the executive again engaged in its own lawmaking process, issuing a rule that nullifies Section 36B. Under the "IRS Rule," subsidies would be available in *all* states "regardless of whether the Exchange is established and operated by a State . . . or by HHS." 26 C.F.R. § 1.36B-2 (2012); 45 C.F.R. § 155.20 (2012). Without meaningful analysis of the ACA's history, the government began a multi-agency rulemaking process based on a convoluted series of linguistic contortions. H. Comm. on Oversight & Gov't Reform

and Comm. on Ways & Means, *Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's Taxes and Subsidies*, 113th Cong. (Feb. 5, 2014) ("Oversight Report").

But, as this Court explained last term, agencies may not "revise clear statutory terms that turn out not to work in practice." *Util. Air Reg. Group v. EPA*, 134 S. Ct. 2427, 2446 (2014); *see also United States v. Locke*, 471 U.S. 84, 95 (1985) ("[T]hat Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do."); *Nixon v. Mo. Mun. League*, 541 U.S. 125, 141 (2004) (Scalia, J., concurring in judgment) ("I do not think . . . that the avoidance of unhappy consequences is adequate basis for interpreting a text.").

At least some inside the government recognized how the rogue IRS Rule would inflict wonton "violence to the text." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring). An internal email observed that "the language restricting tax credits to state-established exchanges may have been a 'drafting oversight.'" Oversight Report at 18. The email further expressed "concern that there was *no direct statutory authority* to interpret an HHS exchange as an 'Exchange established by the State.'" *Id.* (emphasis added). Documents later revealed that "some IRS or Treasury employees recognized that the 'apparently plain' language of the statute restricted PPACA's tax credits to only state exchanges." *Id.* at 25. A "drafting oversight," which is *not* a scrivener's error, can only be fixed by Congress, not an administrative process.

Instead of stopping the rulemaking process and returning to Congress to fix this provision—among many others—the administration doubled-down on executive action. To paraphrase this Court's conclusion in *Judulang*, despite "the Government's yearning for a textual anchor . . . . no matter how many times [§ 36B is] read or parsed, does not provide one. 132 S. Ct. at 488.

C. The IRS Rule Frustrates Rather Than Advances The Purpose Of The ACA

The final nail in the IRS Rule's arbitrary and capricious coffin is the fact that it frustrates rather than advances the ACA's main goal. The government has argued that limiting tax credits to states with exchanges would "run[] counter to this central purpose of the ACA: to provide affordable health care to virtually all Americans." Br. of Appellees, *King v. Burwell*, No. 14-1158, 2014 WL 1028988 at *34 (4th Cir. Mar. 18 2014) (citing *Halbig v. Sebelius*, No. 13-civ-623, 2014 WL 129023 (D.D.C. Jan. 15, 2014)). Emily McMahon, then-Acting Assistant Secretary for Tax Policy at the Treasury Department, testified that denying credits to the exchanges "would have been a very different approach than we believe was contemplated by the Affordable Care Act." Hearing Before the Subcommittee on Energy Policy, Health Care & Entitlements, *Oversight of IRS' Legal Basis for Expanding Obamacare's Taxes and Subsidies* (Jul. 31, 2013) at 87. Limiting tax credits to states that establish exchanges, the argument goes, would be contrary to the purpose of the ACA.

But the ACA was not designed to expand access to healthcare at *all* costs. "[I]t frustrates rather than effectuates legislative intent simplistically to assume

that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam). Through its oversimplification of how the ACA works as a whole, the government incorrectly assumes that the 111th Congress shared President's Obama's evolving vision of how to expand access to healthcare. This bird's-eye view of the forest ignores the trees—all 535 of them. To paraphrase Inigo Montoya, Congress didn't think "expand coverage" means what the executive thinks it means. *The Princess Bride* (20th Century Fox 1987).

As a result of the IRS Rule, states have been able to have their cake and eat it too. Most declined to establish exchanges and yet their citizens still receive subsidies. Now, with more than two-thirds of the states dependent on federal exchanges, Congress's desire for state leadership in healthcare reform has been defeated. This is the exact opposite of the system Congress designed.

The government's position distorts Congress's statutory design based on an elusive and ephemeral intent found nowhere in legislative text or history. The "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993). The "clear text speaks for itself and requires no 'amen' in the historical record," *Halbig v. Burwell*, 758 F.3d 390, 407 (D.C. Cir. 2014) *reh'g en banc granted & judgment vacated*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014). The agency's position is belied by § 36B, its legislative history, and the structure of the law. Rather than propping up the three-legged stool, as the government argues, the

IRS Rule has made one of the legs longer than the other two by paying subsidies in *all* states.

Further, by temporarily waiving the individual and employer mandates—without any notice—the government has kicked out the other two legs. "Without all three legs, the stool—and effective health reform—will not stand." Jonathan Gruber, *Health Care Reform Is a "Three-Legged Stool," supra* note 11. As the government explained to this Court, the individual mandate, "premium tax credits and exchanges" are not "mere adjuncts," but "[e]ach is a stand-alone provision that independently advances in distinct ways *Congress's* core goal of expanded affordable coverage." Br. for Resps. on Severability at 33, *NFIB*, 132 S. Ct. 2566 (emphasis added). By radically and unilaterally modifying the core mechanisms Congress selected, the executive has warped the ACA, reengineering the statute based on the administration's present-day policy preferences.[12]

In a July 2013 interview, President Obama downplayed the importance of the employer mandate, describing it as "not critical to standing up the marketplaces." *Interview with President Obama*, N.Y. Times, July 27 2013, http://goo.gl/K4qZJ7. He contrasted the "way the law was *originally* written" with "simpler ways for [his administration] to certify that [employers are] providing insurance," explaining that "if they do that, then the purpose, the spirit of

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[12] As the government explained to this Court only two years ago, it was "evident that Congress would not have intended the guaranteed-issue and community-rating provisions to *take effect in 2014* if the minimum coverage provision" was not in effect. Br. for Resps. on Severability at 44, *NFIB*, 132 S. Ct. 2566 (emphasis added). Its position has apparently evolved.

the law is met." *Id.* But to simply label a provision "not critical" and waive it three years later reflects a serious disrespect for the tough choices Congress made. The president effectively conceded that he disregarded a provision even though it wasn't the "way the law was originally written" because "the spirit of the law is met." The law may be called "Obamacare," but it is not President Obama's to care for alone and remake in his own image.[13]

IV. EXECUTIVE LAWMAKING POSES A THREAT TO THE RULE OF LAW

The executive branch has not acted as a faithful executor of the ACA. Instead of serving as the legislature's stewards, administration officials have consistently disregarded and modified congressional instructions. The pattern has unfortunately become all too clear: (1) Congress passes a statute, (2) the statute is inconsistent with the president's evolving policy preferences, so (3) the administration modifies or suspends enforcement of the law to achieve a result inconsistent with what Congress designed. This dynamic has lurked in the background of every legal challenge to the ACA, as well as in other areas. *See, e.g.*, OLC Memorandum, "The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others" (Nov. 19, 2014), http://goo.gl/mE20VB.

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[13] Devin Dwyer, *President Obama Shrugs Off 'Obamacare' Critics: 'I Do Care,'* ABC News (Aug. 15, 2011), http://goo.gl/Vro35e ("By the way, I have no problem with folks saying Obama cares. *I do care.* If the other side wants to be the folks that don't care, that's fine with me.").

The IRS Rule fits neatly into this ongoing pattern of ACA modifications. In contrast to other suspensions of the law, however, this approach entails spending billions of dollars without statutory authorization. Perhaps this case stands alone as the most direct avenue to address executive lawmaking in the face of an intransigent Congress. In light of this documented history of abuse, whatever claim to deference administrative agencies are normally owed is weakened with respect to the Affordable Care Act.

A. The Executive Cannot Rewrite Laws When They Prove Unpopular

In what has now become a discomfiting pattern of behavior, the executive branch has flatly ignored the will of Congress by rewriting, amending, and suspending key ACA provisions. Under the guise of rulemaking and prosecutorial discretion, the government has transformed the ACA in ways inconsistent with traditional notions of administrative law and its background principles of "democratic theory." Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 Yale L.J. 2280, 2299 (2006). When the bedrock assumptions underlying the administrative state become unsettled, the default rule of judicial deference becomes less tenable. Perhaps any one act with respect to the ACA, taken in isolation, can be shrugged off as a reasonable exercise of agency discretion. When viewed as a series, however, there is a growing disjunction between the law Congress designed and the skewed facsimile the executive has enforced (or not enforced). This history counsels a more searching judicial review.

Beyond the individual and employer mandates, and the IRS Rule, two other actions illustrate the lawlessness attending ACA implementation.

1. The president cannot exempt congressional employees from the ACA when the law renders insurance unaffordable.

Congress decided that Members and their staff would be required to purchase plans "offered through an Exchange established under" the ACA. Section 1312(d)(3)(D). This statute was part of Congress's balanced design to ensure those in Washington would share the experience of Americans unable to obtain cushy federal benefits. Unsurprisingly, this provision proved unpopular among Hill staffers. Initially, the Office of Personnel Management found that it lacked the authority to offer these subsidized benefits to congressional employees. John Bresnahan, *Government Shutdown: John Boehner's Private Fight for Hill Health Subsidies*, Politico (Oct. 1, 2013), http://goo.gl/Ecl2Ey. After President Obama became "personally involved," however, OPM did a regulatory 180 and issued a rule allowing staffers to buy subsidized plans. John Bresnahan & Jake Sherman, *President Obama on Hill's Obamacare Mess: I'm on It*, Politico (July 31, 2013), http://goo.gl/cK6Wj2; 5 C.F.R. § 890.501 (2013); 78 Fed. Reg. 60653, 60653-54 (Oct. 2, 2013). This rule was flatly inconsistent with statutory text.

Senator Ron Johnson challenged the constitutionality of the OPM rule.[14] Although the

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[14] This case is currently pending before the Seventh Circuit. *Johnson v. OPM*, 14-2723 (7th Cir. 2014).

district court dismissed the case on standing grounds, it spoke directly to the threats posed to our separation of powers when the executive rewrites the law. *Johnson v. OPM*, 1:14-CV-009 (E.D. Wisc. 2014), available at http://goo.gl/GDOvn0. Taking the allegations "as true," wrote Judge Griesbach, the "executive branch has rewritten a key provision of the ACA so as to render it essentially meaningless in order to save members of Congress and their staffs from the consequences of a controversial law that will affect millions of citizens." *Id.* Allowing the president to rewrite the law, and not enforce other requirements "would be a violation of Article I of the Constitution, which reposes the lawmaking power in the legislative branch." *Id.* Although the scope of the change is minor, "the violation alleged is not a mere technicality." *Id.* In short, this executive lawmaking "strikes at one of the most important safeguards against tyranny that the framers erected—the separation of powers." *Id.* (citing *The Federalist* No. 47) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."). A law's unpopularity does not grant the president power to change it.

2. The executive cannot excuse territories from the ACA because the law destabilizes their markets.

Congress implemented the ACA in U.S. territories in a way to render their markets unstable. Under the law, Puerto Rico, the U.S. Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands are considered "states." 42 U.S.C. § 300gg-91(d)(14). Their insurers "remain subject to the

community rating and guaranteed issue requirements but lack a broad base of healthy customers to stabilize prices and avoid adverse selection," throwing the "insurance markets in the territories into turmoil." *Halbig*, 758 F.3d at 410. The territories sought to "be excluded" from the guaranteed-issue and community-rating provisions to avoid this disarray. Letter to N. Mariana Islands (July 12, 2013), http://goo.gl/27VpRH. On three separate occasions, however, the government explained to the territories that Congress crafted the provisions to "apply . . . in the territories." *Id.* In unequivocal terms, the letter concluded that "HHS has *no legal authority* to exclude the territories from the guaranteed availability provision of the Affordable Care Act. However meritorious your request might be, HHS is *not authorized* to choose which provisions . . . might apply to the territories." *Id.* (emphasis added).

What a difference a year makes. On July 16, 2014, CMS Administrator Marilyn Tavenner wrote to the Lieutenant Governor of the U.S. Virgin Islands to "clarify an issue" of the "application of certain Affordable Care Act provisions to health insurance issuers in the territories." Letter to U.S. Virgin Islands (July 16, 2014), http://goo.gl/MYljpg. This is the exact issue on which a year earlier the government said it had "no legal authority" to provide exemptions. In the intervening year, however, HHS learned that "this interpretation is undermining the stability of the territories' health insurance markets."

After a "careful review of this situation and the relevant statutory language, HHS has determined" that the guaranteed-issue and minimum-essential-

coverage provisions "*do not apply* to the territories." *Id.* (emphasis added). It is impossible to reconcile the two letters. After the territories asked for clarification three times, and Congress did nothing to change the statute, the answer should have remained the same: "no." The question is "not what Congress 'would have wanted' but what Congress enacted." *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). Since the consequences of the law proved unpopular, the executive branch once again unilaterally amended the ACA.[15]

In July 2013, the government explained that the territories' only remedy was to "seek legislative relief from Congress, which could enact legislation to create an exemption from the guaranteed availability provision or other changes as Congress deems appropriate." This letter strikes the right balance. Congress designed a statute that yielded unpopular results. The government recognized that the statute did not authorize the agency to exempt the territories, no matter how "meritorious" the request was. Rather than rewriting the law, HHS urged the territories to seek redress from the appropriate

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[15] *Halbig v. Burwell* was decided by the D.C. Circuit on July 22, 2014, six days *after* the letter was issued. In a twist of regulatory irony, the panel justified its decision to invalidate the IRS Rule, in part, because "HHS has nevertheless refused to exempt the territories from the guaranteed issue and community rating requirements, recognizing that, '[h]owever meritorious' the reasons for doing so might be, 'HHS is not authorized to choose which provisions of the [ACA] might apply to the territories.'" *Halbig* 758 F.3d at 410. By the time the opinion was issued, HHS had already reversed its position, apparently discovering new "authorities." The government did not—could not—file a 28(j) letter because the underlying law had not actually changed. Fed. R. App. P. 28(j).

body—Congress. Even if the statute, as designed, "creates an apparent anomaly," this Court, as well agencies "do[] not revise legislation." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033 (2014). As the HHS of 2013 recognized, it is Congress's job to fix unworkable laws.

B. Gridlock Does Not License The President To Transcend His Executive Power

President Obama opined that "in a normal political environment," Congress could have easily passed a "technical change" to the employer mandate that did not "go to the essence of the law." Remarks by the President in a Press Conference (Aug. 9, 2013), http://goo.gl/2sGYTa. But, the president parried, "we are not in a normal atmosphere around here when it comes to 'Obamacare.' We did have the executive authority to do so, and we did so." *Id.* He had already explained that where Congress "is unwilling to act, I will take whatever administrative steps that I can in order to do right by the American people." *Interview with President Obama*, N.Y. Times (July 27, 2013), http://goo.gl/eCVnXY.

But it is entirely beside the point that the gridlocked Congress was—and is—unwilling to amend the ACA as the executive desires. As this Court recently explained in a unanimous decision against this president's similar end-run around Article I, "political opposition" in Congress does not "qualify as an unusual circumstance" to justify the unlawful exercise of presidential power. *NLRB v. Noel Canning*, 134 S. C.t 2550, 2567 (2014); *id.* at 2599 (Scalia, J., concurring) (noting that the "Solicitor General has asked us to view the recess-appointment power as a 'safety valve' against

congressional 'intransigence.'"). Gridlock does not license the president to transcend his Article II powers and subjugate congressional authority. *See generally*, Josh Blackman, *Gridlock and Executive Power* (forthcoming 2015) (manuscript available at http://ssrn.com/abstract=2466707). The separation of powers remain just as strong whether the relationship between Congress and president is symbiotic or antagonistic. Regardless of what the Court does here, it is up to Congress and not the president to decide whether § 36B needs to changed.

C. This Court Should Vacate The IRS Rule To Preserve The Separation of Powers

By issuing a rule that nullifies clear statutory text, the IRS has "has failed to exercise its discretion in a reasoned manner." *Judulang*, 132 S.Ct. 484. The unmistakable pattern of executive lawmaking to implement the ACA embodies the sort of ad hoc behavior that is anathema to the rules for executive action codified in the Administrative Procedure Act. Through this gaming of the regulatory process, *anything* can be deemed "reasonable," even if it is wholly inconsistent with Congress's legal framework.

Through the IRS Rule, the executive emulates Humpty Dumpty. "When I use a word . . . it means just what I choose it to mean—neither more or less." Lewis Carroll, *Through the Looking-Glass*, Chapter 6 (Heritage ed. 1969). This Court should definitively resolve the question Alice asked: "whether you can make words mean so many different things." *Id.*[16]

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[16] One of the first courts to rule on the ACA cited this apt literary classic in its recognition that at the earliest stages this administration disregarded the statute enacted by Congress.

If the executive can unilaterally act based on his evolving conception of the ACA's purpose, just about any decision that *expands* coverage (such as paying illegal subsidies) or even *eliminates* coverage (by waiving mandates) can be justified. A ruling to uphold this behavior sets a dangerous precedent for this nascent superstatute, which will be implemented for years to come by different presidents with different views of the law. Perhaps the most troubling aspect of the government's expansive understanding of ACA implementation is that this precedent could be used in future to license virtually *any* executive action to modify, amend, or suspend *any* duly enacted law.

CONCLUSION

It is not the role of this Court to "express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people." *NFIB*, 132 S. Ct. at 2608. But when the judgment of the people—manifested by the laws passed by Congress—is disregarded, it remains "the duty" of this Court to "enforc[e] those limits" under our "Federal Government of limited powers." *Id.* The

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Florida v. HHS, 716 F.Supp.2d 1120, 1143 (N.D. Fla. 2010) ("Congress should not be permitted to secure and cast politically difficult votes on controversial legislation by deliberately calling something one thing, after which the defenders of that legislation take an 'Alice–in–Wonderland' tack and argue in court that Congress really meant something else entirely, thereby circumventing the safeguard that exists to keep their broad power in check."). *See* Blackman, *Unprecedented* at 98-102 (chronicling government's decision to argue ACA penalty was actually a tax). Tr. of Oral Arg. at 48-49, *HHS v. Florida*, No. 11-398 (Mar. 27, 2012). It was only on the basis of this strategic change that the law could be saved. *See supra* note 2.

Court retains the singular function of safeguarding the separation of powers where Congress cannot do so alone. For "in any controversy between the political branches over a separation-of-powers question, staking out a position and defending it over time is far easier for the Executive Branch than for the Legislative Branch." *Noel Canning*, 134 S. Ct. at 2605 (Scalia, J., concurring).

Because of the executive's deliberate indifference toward the congressionally designed ACA, the separation of powers, and the rule of law itself, this Court should reverse the lower court's judgment.

Respectfully submitted,

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